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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-899

CARL MILLER, ET AL., *Appellants,*

v.

GERALD HEFFERNAN, STATE TAX COMMISSIONER, *Appellee.*

On Appeal From the Supreme Court of Connecticut

JURISDICTIONAL STATEMENT

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GERALD HEFFERNAN, STATE TAX COMMISSIONER, *Appellee*.

On Appeal From the Supreme Court of Connecticut

JURISDICTIONAL STATEMENT

Appellants, Carl E. Miller and Stella J. Miller, appeal from a judgment of the Supreme Court of the State of Connecticut rendered September 27, 1977, upholding the Connecticut Dividends Tax Statute against a challenge to its validity under the Federal Constitution, and submit this Statement to show that this Court has jurisdiction of this appeal and that a substantial Federal Question is involved.

OPINION BELOW

The opinion of the Connecticut Supreme Court is not yet officially reported. It is reported at 378 A.2d 572 (1977). A copy of that opinion appears herein as Appendix A.

JURISDICTION

This case was brought by appellants in the Connecticut Superior Court seeking a refund of the dividends tax assessed against them by the State of Connecticut. Pursuant to Connecticut practice, the dispositive issues were "reserved" by the Connecticut Superior Court for the advice of the Connecticut Supreme Court, on the basis of facts stipulated by the parties. The Connecticut Supreme Court rendered its opinion on September 27, 1977. That opinion disposed of the case in its entirety, and constitutes a final judgment not subject to further review. Notice of appeal to this Court was filed in the Connecticut Supreme Court on December 13, 1977. (Appendix B)[1]

The jurisdiction of this Court on appeal is conferred by 28 U.S.C. Section 1257(2), and is sustained by *Hamilton* v. *University of California,* 293 U.S. 245 (1934), and *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921).

QUESTION PRESENTED

Whether Chapter 224 of the General Statutes of the State of Connecticut violates the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution by imposing a dividends tax on individual residents of the State of Connecticut which has as its intended and actual effect (i) the placing of a substantially disproportionate burden on persons over 65 years of age, and (ii) the placing of an unequal and wholly arbitrary burden on certain recipients of dividend income.

[1] The Connecticut Superior Court entered a judgment in conformity with the Supreme Court's opinion on December 12, 1977 a copy of which appears herein as Appendix C. In order to avoid any possible question as to this Court's jurisdiction, a notice of appeal was also filed in the Connecticut Superior Court on December 13, 1977. (Appendix B)

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Connecticut Statutes, the validity of which are here involved, comprise Chapter 224 of the Connecticut General Statutes, Revision of 1958 (Sections 12-505 through 12-522), as amended through December 31, 1975. The instant tax is imposed under Section 12-506(a)(1) as follows:

> Sec. 12-506. Imposition of Tax. (a) A tax is hereby imposed at the rate of seven per cent on (1) all dividends earned, received in fact or constructively, accrued or credited to the taxpayer during his taxable year except that no such tax shall be imposed unless the taxpayer's adjusted gross income in such year equals or exceeds twenty thousand dollars, . . .

Definitions of the terms "taxpayer" and "dividends" are found in Section 12-505 as follows:

> "Taxpayer" means a husband and wife both of whom are residents in this state and who file for the taxable year a single federal income tax return jointly, and each and every other individual resident in this state, who have or has earnings received, credited or accrued in any taxable year from gains from the sale or exchange of capital assets, or from dividends subject to tax under this chapter;
>
> . . .
>
> "dividends" means those dividends taxable for federal income tax purposes without regard to the dividend exclusion; . . .

A copy of the full text of Sections 12-505 and 12-506 appears herein as Appendix D.

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Dividends Tax component of Chapter 224 of the Connecticut General Statutes, which became effective as of January 1, 1975, imposes a tax of 7 percent on all dividend income received by each "taxpayer" who is a Connecticut resident and who has an adjusted gross income of $20,000 or more. Any such taxpayer with an adjusted gross income of less than $20,000 has his entire dividend income exempted from the tax. Further, this chapter defines the term "taxpayer" to include a husband and wife who together file one joint federal tax return. Connecticut imposes no tax whatsoever on wages or salaries; nor does it tax interest income or rental income or income from business received by individuals.

Appellants, Connecticut taxpayers who are both over the age of 65 and who filed a joint federal income tax return for the 1975 taxable year, commenced this action in the Superior Court in Hartford. In view of the issues of public importance involved, that Court, pursuant to Connecticut practice, "reserved" certain questions for the advice of the Connecticut Supreme Court, including the following:

> Does section 43 of the act which provides for a $20,000 exemption violate the equal protection provisions of section 1 of the 14th amendment to the United States constitution?
>
> Does section 42 of the act defining taxpayer to include married people filing a joint federal return violate the equal protection provisions of section 1 of the fourteenth amendment to the United States constitution?

The Connecticut Supreme Court answered both questions in the negative (pp. A-3-9 and A-12, *infra*).

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

The principal question presented by this appeal concerns the constitutionality of a statute which has the effect of imposing a tax burden by reason of old age. While old age may not be a "suspect classification" within the meaning of the Fourteenth Amendment, the statute in question here melds this classification with a degree of deliberate intent and arbitrary design which demonstrates it to be wholly without the constitutionally required rational basis.

The statutory scheme in question taxes all dividend income of taxpayers who have adjusted gross incomes greater than $20,000.[2] By imposing what is in effect an income tax on a selected type of income, the Dividends Tax creates a *de facto* tax classification by age. Retired persons who generally have little or no earned income are required to bear the burden of this tax. A review of available statistics demonstrates that persons 65 years or older represent 10.4 percent of the population of the State of Connecticut. United States Department of Commerce, *Estimates of the Population of States, by Age — Population Estimates and Projections, Series* P-25, No. 619, January 1976, Table 1, p. 2. Yet, it is estimated that this same group of persons is forced to contribute 48 percent of the aggregate revenue raised by the Dividends Tax. Thomas Houde of the State of Connecticut Office of Fiscal Analysis, *Taxation of Dividends,* p. 7, April 4, 1975. Moreover, this disproportionate treatment is most dramatic in those income groups on the lower part of the income scale. Specifically, it is estimated that, of all those Connecticut residents with adjusted gross incomes in

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[2] The statute was amended in 1977 to change the tax from a flat 7 percent to a graduated scale related to adjusted gross income. Connecticut Public Act 77-370, Section 10. This amendment has no impact whatsoever on the constitutional claim of these appellants.

the $20,000-$30,000 range, the elderly contribute 56 percent of the dividends tax (as compared to the 48 percent contribution noted above which they make to the tax revenues when *all* income levels are considered). *Taxation of Dividends,* p. 7, *supra.* Assuming a relatively even distribution of the elderly population among all levels of income, each elderly person in this $20,000-$30,000 income bracket contributes an average of 11 times as much dividend tax as each Connecticut resident under age 65. This disparity is particularly significant in view of the fact that most persons under the age of 65 are receiving income in the form of wages or salary which is entirely untaxed by the State of Connecticut.

The discriminatory effect of the Dividends Tax against the elderly is compounded by the fact that it is computed on adjusted gross income. While there is no fundamental right to the personal deduction, *Interstate Transit Lines* v. *Commissioner,* 319 U.S. 590, 593 (1943), the denial of deductions for medical expenses places an especially heavy burden on the elderly. Using 1971 as a test year, out-of-pocket payments by the elderly for medical expenses were more than twice as much as those of younger persons. Note, *Discrimination Against the Elderly: A Prospectus of the Problem,* 7 Suffolk L. Rev. 917, 919-20 n. 19 (1973), citing A REPORT OF THE SPECIAL COMMITTEE ON AGING, UNITED STATES SENATE, DEVELOPMENTS IN AGING: 1971 and JANUARY - MARCH 1972, S. Rep. No. 92-784, 92d Cong., 2d Sess. XXII (1972). The degree of unfairness of the basic classification imposed by the tax, combined with the inherent inequity due to other provisions such as this one, may legitimately enter into the Court's overall appraisal of the constitutionality of the Dividends Tax. E.g., *Concordia Fire Ins. Co.* v. *Illinois,* 292 U.S. 535, 547 (1934).

The discrimination against the elderly under the Dividends Tax can draw no support from *Massachusetts Board*

of Retirement v. *Murgia,* 427 U.S. 307 (1976). The mandatory police officer retirement rule there was upheld on a rational basis linked to public safety. No such factor exists here. Indeed, the Dividends Tax is much closer to the social security provision requiring widowers but not widows to demonstrate prior dependency on their deceased spouses. In *Califano* v. *Goldfarb,* — U.S. —, 97 S. Ct. 1021 (1977), without determining gender to be a suspect classification, this Court struck down the provision as being "forbidden by the Constitution, at least when supported by no more substantial justification than 'archaic and overbroad' generalizations". 97 S. Ct. at 1026. See also *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975). Here the challenged classification cannot find support even in such generalizations as were condemned in *Califano.*

An additional classification imposed by the Dividends Tax in question underscores its general discriminatory impact. The tax structure grants a wholesale exemption to all persons having adjusted gross incomes less than $20,000 regardless of the amount of their dividend income, while providing no exemption whatsoever for the dividend component of income of any taxpayer having an adjusted gross income in excess of $20,000. This result follows from the presence of a "notch exemption", that is: all dividend income received by a taxpayer with an adjusted gross income of less than $20,000 is exempt, while any taxpayer with an adjusted gross income equal to $20,000 has his *entire* dividend income subjected to the 7 percent tax. A taxpayer with an adjusted gross income of $19,999, all of which was dividend income, will have no tax and retain his $19,999. A second taxpayer with an adjusted gross income of $20,000, again all represented by dividends, would be subject to a tax of $1,400 leaving him with only $18,600, an amount considerably less than that of his untaxed neighbor. Therefore by receiving an extra dollar of income, the taxpayer subjects himself to a tax liability of $1,400. The direct effect

of this wholesale exemption as to taxpayer status is to preclude an equitable distribution of the tax which might result in a lower tax being imposed on all taxpayers. The overall effect is to further penalize those persons who depend primarily upon income in the form of dividends rather than wages or salary or interest which remain exempt.

A final indication of the general arbitrary and irrational nature of the Dividends Tax can be drawn from its definition of the term "taxpayer" to include a husband and wife filing a joint tax return. By aggregating income for purposes of the $20,000 exemption, the Dividends Tax penalizes married couples who choose to take advantage of the federal benefits associated with a joint tax return, which federal benefits were instituted in order to alleviate a preexisting discriminatory effect of a different nature relating to the federal tax law. S. Rep. No. 1013, 80th Cong., 2d Sess., 3 (1948).

In addition to the direct injury to the appellants caused by the discriminatory Dividends Tax, sustaining this tax results in an indirect, but no less significant, injury to the fundamental corporate structure. Such a result follows from a consideration of the Dividends Tax in light of the present federal tax law, which imposes what is effectively a two-tier tax on dividend income. The same funds are subject to the federal tax in the form of income as received by the corporation and again in the form of dividends as received by the stockholders. The Connecticut Dividends Tax imposes a third level of taxation upon those Connecticut residents within its scope. Such a tax burden can only have the effect of dissuading investors from purchasing equity securities, thereby resulting in a detrimental impact on the ability of corporations to raise funds through the fundamental mechanism of equity financing. Such an unfortunate result is further endorsed by the general Connecticut tax policy which exempts virtually all other types of an individual's income from state taxation. For some bizarre

reason, Connecticut has chosen to single out for taxation a source of income, dividends, already twice taxed.

This is not a situation where the enacting authority may have been ignorant of the discriminatory effects of its action. For example, the Connecticut General Assembly was clearly aware of the disproportionate effect which the Dividends Tax would place on the elderly. See the legislative history, Conn. Sen. Proc., 1975, p. 1681-1682, 1685-1686 (May 8, 1975) and Conn. House Proc., 1975, p. 3141 (May 9, 1975). Relevant portions of the transcripts appear herein as Appendix E.

The deference generally afforded legislatures in defining classifications within its taxing authority is not applicable here. A discriminatory tax law cannot be sustained against the complaint of an aggrieved party if the classification appears to be "altogether illusory", *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920); nor can a classification stand if it is offensive to "the plain standards of common sense", *Hartford S.B.I. & Ins. Co.* v. *Harrison*, 301 U.S. 459, 462 (1937), or if it acts as a "hostile and oppressive discrimination" between particular persons and classes. *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940). Indeed,

> there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of legislation". (citations omitted) *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527 (1959).

It is respectfully submitted that this point has been met and exceeded by the Dividends Tax challenged here in its resort to a palpably arbitrary classification of taxpayers by age and, because of the "notch exemption", its unequal treatment of taxpayers having substantially equal ability to pay.

CONCLUSION

Appellants respectfully submit that the Federal Question presented in this Statement is substantial both as to the individual appellants and generally as to the taxing power of state legislatures and that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX A

STATE OF CONNECTICUT
SUPREME COURT
June Term, 1977
[Filed September 27, 1977]

CARL MILLER, ET AL. v. GERALD J. HEFFERNAN, TAX COMMISSIONER

Appeal by the plaintiffs from the denial by the defendant of a tax refund, brought to the Superior Court in Hartford County and reserved by the court, *Alexander, J.*, for the advice of this court.

John S. Murtha, with whom were *John E. Silliman* and, on the brief, *William J. Keenan,* for the plaintiffs.

Richard K. Greenberg, assistant attorney general, with whom were *Ralph G. Murphy,* assistant attorney general, and *Carl R. Ajello,* attorney general, for the defendant.

LOISELLE, J. This case comes to the court on a reservation from the Superior Court in Hartford County. The questions stipulated by the parties, noted in the footnote below,[1]

[1] "1. Does section 43 of the act which provides for a $20,000 exemption violate the equal protection provisions of article first, section 20, of the Connecticut constitution?

"2. Does section 43 of the act which provides for a $20,000 exemption violate the equal protection provisions of section 1 of the 14th amendment to the United States constitution?

"3. Does section 43 of the act which provides for a $20,000 exemption constitute a taking of property without due process of law in violation of article first, section 8, of the Connecticut constitution?

"4. Does section 43 of the act which provides for a $20,000 exemption constitute a taking of property without due process of law in violation of section 1 of said 14th amendment?

"5. Does section 42 of the act defining taxpayer to include married people filing a joint federal return violate the equal protection provisions of article first, section 20, of the Connecticut constitution?

"6. Does section 42 of the act defining taxpayer to include married people filing a joint federal return violate the equal protection provisions of section 1 of the fourteenth amendment to the United States constitution?

concern the constitutionality of two provisions of 1975 Public Acts, No. 75-213, subsequently codified as §§ 12-505 and 12-506 of the General Statutes. The challenged provisions include § 43,[2] which imposes a 7 percent tax upon all dividends received by taxpayers with adjusted gross incomes of $20,000 or more, and § 42,[3] which defines "taxpayer" to include "a husband and wife both of whom are residents in this state and who file for the taxable year a single federal income tax return jointly."

The plaintiffs, a husband and wife who filed a joint federal income tax return, are residents of Connecticut with an adjusted gross income of more than $20,000. In accordance with the requirements of the noted provisions, they filed a state capital gains and dividends tax return, paying the prescribed tax. Simultaneously, they filed a claim for refund alleging the tax to be unconstitutional. Upon denial of their claim by the defendant, the plaintiffs appealed to the Superior Court, which reserved the matter for the advice of this court.

"7. Was the defendant tax commissioner's denial of the plaintiff's claim for refund in accordance with the law?

"8. If, in response to questions 1 through 6, any section of the act has been held to violate any provisions of the Connecticut constitution or the constitution of the United States, are the remaining provisions of the act pertaining to the tax on dividends affected?"

[2] "[General Statutes] Sec. 12-506. IMPOSITION OF TAX. (a) A tax is hereby imposed at the rate of seven per cent on (1) all dividends earned, received in fact or constructively, accrued or credited to the taxpayer during his taxable year except that no such tax shall be imposed unless the taxpayer's adjusted gross income in such year equals or exceeds twenty thousand dollars, and (2) all net gains from the sale or exchange of capital assets which have been earned, received in fact or constructively, accrued or credited to the taxpayer during his taxable year subject to the exemptions allowed in section 12-506c, and section 12-506f, when applicable. (b) Any taxpayer whose adjusted gross income in any taxable year is less than twenty thousand dollars and whose net gains from the sale or exchange of capital assets in such year do not exceed (1) two hundred dollars in the case of a husband and wife and (2) one hundred dollars in all other cases shall not be subject to the tax imposed by subsection (a) of this section, and shall not be required to file any return under the provisions of section 12-508, for such year."

This provision has recently been repealed by 1977 Public Acts, No. 77-370, § 10. In its place a graduated form of the dividends tax is imposed on taxpayers with adjusted gross incomes of $20,000 or more. The rate of taxation ranges from a 1 percent tax on all dividends received by a taxpayer with an adjusted gross income of at least $20,000 but less than $22,000, up to a 9 percent tax on all dividends received by a taxpayer with an adjusted gross income of over $100,000.

[3] General Statutes § 12-505.

I

The first two questions are whether § 43 of the act (General Statutes § 12-506), which provides for a tax on dividends received by taxpayers with adjusted gross incomes of $20,000 or more, violates article first, § 20, of the Connecticut constitution or § 1 of the fourteenth amendment to the United States constitution. These equal protection provisions have often been held to have a like meaning, imposing similar constitutional limitations. *Horton* v. *Meskill,* 172 Conn. 615, 639, A.2d ; *State* v. *Rao,* 171 Conn. 600, 601, 370 A.2d 1310. The questions will, therefore, be treated together.

Where legislation neither containing a suspect classification nor impinging upon a fundamental right is challenged on equal protection grounds, the burden is on the complaining party to establish that the statutory distinction is without rational basis. *Horton* v. *Meskill,* supra, 640; *Kellems* v. *Brown,* 163 Conn. 478, 486, 313 A.2d 53, appeal dismissed, 409 U.S. 1099, 93 S. Ct. 911, 34 L. Ed. 2d 678. This standard is even more stringent where the challenged legislation pertains to taxation. As this court emphasized in *Kellems* v. *Brown,* supra, 487, quoting *Madden* v. *Kentucky,* 309 U.S. 83, 88, 60 S. Ct. 406, 84 L. Ed. 590, " 'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and

classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'"

The plaintiffs claim that § 43 of the act, by singling out for taxation those dividends received by taxpayers with adjusted gross incomes of $20,000 or more, while leaving untaxed dividends received by those with lower adjusted gross incomes, constitutes just such "clear and hostile discrimination." It is to be emphasized that the question which must be addressed is not whether the prescribed mode of taxation is wise; *Bassett* v. *Rose*, 141 Conn. 129, 104 A.2d 212; but whether the classification it delineates is reasonable, resting upon "some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989.

The plaintiffs urge that the $20,000 demarcation places an undue tax burden on a minority of taxpayers, alleging further that a disproportionate share of the burden falls on taxpayers over sixty-five years of age. In *Kellems* v. *Brown*, supra, this court determined that the legislature's decision to tax dividends while leaving untaxed other forms of investment income was not violative of equal protection guarantees. In reenacting this dividends tax, which of itself affects a minority of the total population of taxpayers, the legislature chose to exclude from its coverage those dividend-receiving taxpayers with adjusted gross incomes of less than $20,000. Clearly this exemption further limits the affected class, yet this fact alone does not render the tax unconstitutional.

In *Independent Warehouses, Inc.* v. *Scheele*, 331 U.S. 70, 67 S. Ct. 1062, 91 L. Ed. 1346, the United States Supreme Court held as not violative of the equal protection clause a municipal ordinance selecting out for an annual licensing tax only those engaged in commercial warehousing, despite

the fact that only one such operation existed within the township. Citing *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S. Ct. 868, 81 L. Ed. 1245, the court noted (p. 86): "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality in taxation. . . . This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation." See also *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, 159, 50 S. Ct. 310, 74 L. Ed. 775.

The court in *Carmichael* further emphasized that a legislature is not bound to tax every member of a class or none, as long as some rational basis for the designated intermediary distinction exists. That such basis exists is to be assumed "if there is any conceivable state of facts which would support it." *Carmichael* v. *Southern Coal & Coke Co.*, supra, 509. The plaintiffs' own expressed concern provides one such obvious conceivable basis for the $20,000 demarcation: protection for those with limited, fixed incomes who, like some of the elderly, rely solely or heavily upon dividend income for their livelihood.

The plaintiffs, however, urge that no rational basis can be found for distinguishing between a taxpayer with a $19,999.99 adjusted gross income and one with a $20,000 adjusted gross income. Yet all laws, especially those in the tax area, are necessarily dotted with such fine distinctions. "It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not." *Carmichael* v. *Southern Coal & Coke*

Co., supra, 510. As long as some conceivable rational basis for the difference exists, "a classification is not offensive merely because it is not made with mathematical nicety." *Karp* v. *Zoning Board,* 156 Conn. 287, 299, 240 A.2d 845.

In the present case, the legislature's line may well have been drawn in light of the overall tax scheme, the fiscal needs of the state, and the economy. United States Department of Labor statistics show that in 1973, just prior to the enactment of the statute here at issue, the average cost for an urban family of four on a lower budget was $8,181 a year, while the intermediate and higher levels were $12,626 and $18,201 respectively. In Hartford, the average cost for a family of four at the intermediate level was $13,721, and at the higher level, $19,127.[4] Conceivably, the legislature was attempting to draw a line which left the average family budget intact. While such an approach is necessarily discriminatory, the equal protection clause proscribes only "invidious discrimination but does not demand identical treatment for all persons without consideration of differences in relevant circumstances." *Karp* v. *Zoning Board,* supra, 294. "If the . . . classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." *Brown-Forman Co.* v. *Kentucky,* 217 U.S. 563, 573, 30 S. Ct. 578, 54 L. Ed. 883.

The plaintiffs emphasize the distinction between a notch exemption, such as that at issue here, and the more usual total exemption. The total exemption leaves a specified amount of income untaxed for all taxpayers, while the notch exemption essentially designates the class of taxpayers subject to the tax. For those taxpayers within the taxed class, all income denoted, in this case all dividend income,

[4] U.S. Department of Labor, Bureau of Labor Statistics, "Autumn, 1973, Urban Family Budgets and Comparative Indexes for Selected Urban Areas" (July 10, 1974).

is subject to the tax without any threshold exemption. Thus, under the existing dividends tax, a taxpayer with an adjusted gross income of $20,000 would be subjected to a $1400 tax in the unusual event that all his income was derived from dividends, while a taxpayer only marginally less well endowed with dividends, receiving an adjusted gross income of $19,999, would be entirely exempt from dividend taxation. The plaintiffs argue that such discrepancy in treatment is palpably arbitrary and contrary to any concept of equality and fairness.

It should be noted that such tax effects have been considered by other courts and found not violative of equal protection. In *Magoun* v. *Illinois Trust & Savings Bank,* 170 U.S. 283, 18 S. Ct. 594, 42 L. Ed. 1037, the United States Supreme Court held reasonable a classification subjecting a legatee of $10,000 to a 3 percent tax giving him a net of $9700, whereas the legatee of $10,001 was subject to a 4 percent tax and would receive only $9,600.96. In *Metropolis Theatre Co.* v. *Chicago,* 228 U.S. 61, 33 S. Ct. 441, 57 L. Ed. 730, the court sustained a tax of $1000 upon theatres charging admissions of $1 or more but only $400 upon theatres similarly situated charging admissions of less than $1. More recently, the Delaware Supreme Court upheld a tax which, in part, exempted from taxation those with earnings of $4000, while taxing those earning $4,000.01. *Betts* v. *Zeller,* 263 A.2d 290 (Del.).

In the present case, the tax attaches only to dividend income. According to a table attached to the stipulation, for the majority of taxpayers subject to the tax the bulk of income is not derived from dividends and will therefore remain untouched by this statute. Those few taxpayers whose adjusted gross incomes of more than $20,000 are derived solely from dividends are the exceptions.[5] Thus, the extent

[5] During the debate concerning this bill a legislator asserted that such a taxpayer would have an investment portfolio worth $400,000 to $500,000. 18 H.R. Proc., pt. 7, 1975 Sess., p. 3143.

to which this particular notch exemption actually permits any disparity in the tax treatment of income below the $20,000 demarcation in reality is not so great as to render the tax unreasonable. The statute "cannot be said to be arbitrary because it falls in the twilight zone between those members of the class which plainly can and those which plainly cannot expediently be taxed." *Carmichael* v. *Southern Coal & Coke Co.*, supra, 511. The notch exemption, combined with a 7 percent rate of taxation, is not unreasonable in view of the conceivable legislative objectives already discussed.

It should be observed, however, that while the court concedes the rationality of this form of exemption under the particular facts of this case, the rationality of notch exemptions generally is not here determined. As has been illustrated, notch exemptions have the potential for leaving a taxpayer subject to the tax with a lower net income after taxes than that of a taxpayer exempt from the tax. Taken to an extreme, this disparity in the treatment of income below the designated base could lose any rational connection with proper legislative objectives. Thus notch exemptions are to be carefully analyzed in terms of the rationality of the particular base and the rate of taxation. "The standard of what is arbitrary and unreasonable is not rigid. . . . [T]he question is usually one of degree." *In re Vanderbilt*, 281 N.Y. 297, 314, 22 N.E.2d 379, aff'd sub nom. *Whitney* v. *State Tax Commission*, 309 U.S. 530, 60 S. Ct. 635, 84 L. Ed. 909.

The plaintiffs rely heavily upon *Kalian* v. *Langton*, 96 R.I. 367, 192 A.2d 12, in which a court held as violative of equal protection a tax statute which immunized from taxation businesses with gross receipts of less than $30,000 while subjecting businesses with gross receipts in excess of this to a tax on all but $5000 of the total receipts. That case is not persuasive. A determination on the basis of one set of facts as to what is reasonable cannot be superimposed

upon a different set of facts. The determination of rationality arises in each case from an evaluation of a complex of factors.

Since the plaintiffs have failed to establish that § 43 is invidious or palpably arbitrary, it is not necessary to respond to their further contentions that that provision cannot be justified on grounds of administrative convenience or ability to pay.[6] Sufficient justification exists in those policy considerations within the legislative province. As noted above, "[t]he latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy." *Spector Motor Service, Inc.* v. *Walsh*, 135 Conn. 37, 64, 61 A.2d 89.

The answer to questions one and two is "no."

II

The third and fourth questions inquire whether the $20,000 exemption provision constitutes a taking of property without due process of law in violation of article first, § 8, of the Connecticut constitution, or § 1 of the fourteenth amendment of the United States constitution. The common meaning attributed to those due process provisions allows for these questions to be treated as one. *Roundhouse Construction Corporation* v. *Telesco Masons Supplies Co.*, 168 Conn. 371, 374, 362 A.2d 778.

Except in unusual circumstances, the due process clause does not limit the taxing power of the legislature. As the court in *A. Magnano Co.* v. *Hamilton*, 292 U.S. 40, 44, 54 S. Ct. 599, 78 L. Ed. 1109, emphasized, "[t]hat clause is ap-

[6] The plaintiffs contend that adjusted gross income is not always a true indication of ability to pay a tax. In ruling that a tax on gross receipts (as opposed to one on net income) was permissible, the United States Supreme Court stated: " 'The legislature is not required to make meticulous adjustments to avoid incidental hardships.' " *New York Rapid Transit Corporation* v. *New York*, 303 U.S. 573, 582, 58 S. Ct. 721, 82 L. Ed. 1024.

plicable to a taxing statute . . . only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property."

The plaintiffs urge that the dividends tax imposed upon the specified class of taxpayers "cannot possibly bear any fiscal relation to the protection, opportunities and benefits given by the state in return" and hence, given such inequity between the burden imposed and the benefit received, is violative of due process guarantees. A tax is not required to be directly related to specific benefits received by the taxpayer. The United States Supreme Court, in upholding a tax on utilities to raise funds to relieve unemployment, held that "it is not constitutionally necessary that the classification be related to the appropriation." *New York Rapid Transit Corporation* v. *New York*, 303 U.S. 573, 587, 58 S. Ct. 721, 82 L. Ed. 1024. As the court in *Dane* v. *Jackson*, 256 U.S. 589, 598-99, 41 S. Ct. 566, 65 L. Ed. 1107, observed, "since the system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers, in proportion to payment made, as will be returned to every other individual or class . . . a state tax law will be held to conflict with the Fourteenth Amendment[7] only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—'to spoliation under the guise of exerting the power of taxing.'" The court went on (p. 600) to stress that the statute before it was not isolated, but one part of an "elaborate and involved system of state taxation" which would be affected by its ruling.

[7] The court was rejecting a challenge based on the due process and equal protection clauses of the fourteenth amendment.

It cannot be said that the dividends tax with its $20,000 demarcation constitutes such "flagrant and palpable inequality between the burden imposed and the benefit received," particularly in light of the legislature's view of the state's overall tax structure. There is ample evidence to suggest that proponents of the act viewed its enactment as an attempt to equalize the overall tax burden. In a February 11, 1971, report of the Connecticut state revenue task force, the state's tax structure was found to be "largely regressive because of its heavy reliance upon property and excise taxes." A commentator supportive of a dividends tax suggested that such property and excise taxes result "in an overall higher burden on wage earners, small businesses, and low-income groups. In fact, it may be something of a paradox that the exclusion of the intangible property class from the tax base contributes as much to the regressive tax burden on these low-income individuals as anything else."[8] In the debate in both the senate and the house on the bill which became 1975 Public Acts, No. 75-213, legislators supportive of the bill spoke of its potential equalizing effect. 18 H.R. Proc., pt. 7, 1975 Sess., p. 3140 (remarks of Representative Tanger); id, p. 3144 (remarks of Representative Collins); 18 S. Proc., pt. 4, 1975 Sess., p. 1685 (remarks of Senator Beck).

Imposition of the $20,000 adjusted gross income base merely reflects a legislative determination of state policy. Where the case is not one of extreme inequality "but involves rather a question of state policy, of a character which the people have been satisfied to leave to the judgment, patriotism and sense of justice of representatives in their state legislature," it is not for the court to intervene. *Dane* v. *Jackson*, supra, 601.

The answer to questions three and four is "no."

[8] Snyder, "Tax Policy in the 1971 Connecticut General Assembly," 46 Conn. B.J. 136, 163.

III

Questions five and six concern § 42 of the act, which defines "taxpayer" to include married people who filed a joint federal tax return. The plaintiffs urge that this provision unjustifiably discriminates against married persons filing jointly, in violation of both article first, § 20, of the Connecticut constitution and § 1 of the fourteenth amendment to the United States constitution.

Like all other married taxpayers in this state, the plaintiffs are granted the option of filing their federal tax returns jointly or separately, according to what they consider to be in their own best interest, after weighing the benefit of each approach. They may elect to take advantage of the benefits accruing under federal law through joint filing or those granted under state law through separate filing. As the United States Supreme Court stated in *Merchants' & Manufacturers' Bank* v. *Pennsylvania,* 167 U.S. 461, 464, 17 S. Ct. 829, 42 L. Ed. 236, "[t]he inequality of result comes from the election of certain taxpayers to avail themselves of privileges offered to all" and this cannot constitute an infringement upon equal protection guarantees. See also *Wilson* v. *United States,* 376 F.2d 280, 285 (Ct. Cl.); *Astrotech, Inc.* v. *Commissioner of Taxation,* Minn. , 244 N.W.2d 126.

The answer to questions five and six is "no."

IV

In the light of our answers to the initial six questions presented for review, the answer to question seven is clear: The defendant tax commissioner's denial of the plaintiffs' claim for refund was in accordance with the law.

No costs will be taxed in this court in favor of any party.

In this opinion the other judges concurred.

APPENDIX B

SUPERIOR COURT OF THE STATE OF CONNECTICUT

SUPREME COURT OF THE STATE OF CONNECTICUT

[Identical Notices of Appeal were filed in the above courts on December 13, 1977, except for the bracketed material.]

[Caption omitted]

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Carl E. Miller and Stella J. Miller, the Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the [Superior Court] [Supreme Court] of the State of Connecticut, upholding the constitutionality of Statutes of the State of Connecticut which impose a tax upon income from dividends, entered in this action on [December 12, 1977] [September 27, 1977].

This Appeal is taken pursuant to 28 U.S.C. Section 1257(2).

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JOHN S. MURTHA
Attorney for Appellants

APPENDIX C

STATE OF CONNECTICUT

SUPERIOR COURT, HARTFORD COUNTY

December 12, 1977

No. 205505

CARL E. MILLER and STELLA J. MILLER, both of the Town of Farmington, County of Hartford, State of Connecticut,

v.

GERALD J. HEFFERNAN, of the Town of Ansonia, County of New Haven, State of Connecticut, Tax Commissioner of the State of Connecticut;

Present: The Honorable JOHN M. ALEXANDER

Judgment

This action by Appeal and Citation dated August 10, 1976 asking for a refund of taxes paid pursuant to the ostensible authority of Chapter 224 of the Connecticut General Statutes, came to this Court on the fifth Tuesday of August, 1976;

And thereafter the defendant appeared and filed an answer as on file;

And on the twenty-ninth day of December 1976, the above cause on Stipulation of the parties was reserved for advice of the Supreme Court pursuant to the provisions of the Practice Book Sections 738 and 739 upon eight questions concerning the constitutionality of certain provisions of Chapter 224 of the Connecticut General Statutes, as amended through December 31, 1975 and, the Supreme Court having heard the parties, on September 27, 1977, advised the Superior Court that said Chapter 224 was con-

stitutional under the Constitution of the United States and the Constitution of the State of Connecticut.

In accordance with the opinion of the Supreme Court, it is, therefore,

ORDERED, ADJUDGED AND DECREED that the plaintiffs' appeal is denied and that the plaintiffs' request for a refund is denied.

JOHN M. ALEXANDER
Judge

APPENDIX D

These sections of the Connecticut General Statutes are reported in Volume III of the General Statutes of Connecticut at pages 295 to 296 of the 1977 Revision.

Sec. 12-505. Definitions. When used in this chapter, unless the context otherwise requires: "Taxpayer" means a husband and wife both of whom are residents in this state and who file for the taxable year a single federal income tax return jointly, and each and every other individual resident in this state, who have or has earnings received, credited or accrued in any taxable year from gains from the sale or exchange of capital assets, or from dividends subject to tax under this chapter; "taxable year" means the same accounting period as the taxpayer's taxable year for federal income tax purposes or that portion of such year as either commences when the taxpayer becomes a resident or ends when the taxpayer ceases to be a resident of this state; "dividends" means those dividends taxable for federal income tax purposes without regard to the dividend exclusion; "tax commissioner" or "commissioner" means the state tax commissioner; "gains from the sale or exchange of capital assets" means net gain as determined for federal income tax purposes, after due allowance for losses and holding periods, (1) from sales or exchanges of capital assets or assets treated as capital assets, other than notes, bonds or other obligations of the state of Connecticut or any of the political subdivisions thereof, or its or their respective agencies or instrumentalities, or (2) from transactions or events taxable to the taxpayer as such sales or exchanges, and being the net amount includable in the taxpayer's adjusted gross income, with respect to all such sales, exchanges, transactions, or events, under the provisions of the Internal Revenue Code in effect for the taxable year; "resident" means an individual: (1) Who is domiciled in this state; provided, if the individual maintains no permanent place of abode in this

state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, he shall be deemed not a resident; or (2) who is not domiciled in this state but maintains a permanent place of abode in this state and is in this state for an aggregate of more than one hundred eighty-three days of the taxable year, unless he, not being domiciled in this state, is in the armed forces of the United States; "person" means the taxpayer or any pledgee, assignee, receiver, referee, trustee, conservator, guardian, custodian or other fiduciary of the taxpayer acting for the taxpayer; "adjusted gross income" means adjusted gross income for federal income tax purposes.

Sec. 12-506. Imposition of tax. (a) A tax is hereby imposed at the rate of seven per cent on (1) all dividends earned, received in fact or constructively, accrued or credited to the taxpayer during his taxable year except that no such tax shall be imposed unless the taxpayer's adjusted gross income in such year equals or exceeds twenty thousand dollars, and (2) all net gains from the sale or exchange of capital assets which have been earned, received in fact or constructively, accrued or credited to the taxpayer during his taxable year subject to the exemptions allowed in section 12-506c, and section 12-506f, when applicable. (b) Any taxpayer whose adjusted gross income in any taxable year is less than twenty thousand dollars and whose net gains from the sale or exchange of capital assets in such year do not exceed (1) two hundred dollars in the case of a husband and wife and (2) one hundred dollars in all other cases shall not be subject to the tax imposed by subsection (a) of this section, and shall not be required to file any return under the provisions of section 12-508, for such year.

APPENDIX E

LEGISLATIVE HISTORY — EXCERPTS

1. Senate Hearing, May 8, 1975 on proposed amendment deleting any reference to the dividends tax in the tax package.

Senator Guidera:

". . . Well, exactly who will pay this particular tax? I have a chart here that was given to me by the joint committee on Legislative Management and Office of Fiscal Analysis, dated April 4, 1975. It's entitled "Taxation of Dividends" and it is provided to me by a gentleman by the name of Thomas Howd (?) [SIC], I hope I am pronouncing his name right; and there is a bar graph on page six which indicates who receives dividend income and who pays the dividends tax, should it go through in the form it is proposed in this particular piece of legislation.[1] And guess who is going to pay more than fifty percent of this proposed dividends tax? That's right, the same person we tax all the time; the same person we bleed about during the campaign but when it comes time to give them some relief, we just don't do it. I am talking about the senior citizens. The individual over sixty-five will pay more than half of the tax that is being proposed here. So I fear, Mr. President, that what this piece of legislation is doing is retreating very rapidly from tax exemptions for the elderly, for senior citizens who are living on fixed incomes. Really it is a shame, in this state, and I have always thought it was a shame — whether it is a Republican or a Democratic administration, we talk about doing something for the senior citizens, and then when it comes time to pass the tax package, we give them some small break, but really when it comes to the dividends tax, we tell them that despite all the years of hard work and despite all the years of saving, and

[1] Although a different version of the tax was passed than was originally proposed, the record indicates that its actual burden on the elderly is still almost 50 percent.

despite all the years of putting money aside for a rainy day, now we are going to take it away from them. . . ."

Sen. Proc., 1975, p. 1681-1682.

Senator Bozzuto:

"Mr. President, this tax is discriminatory. This is a tax for those who are growing old. This is a tax for those people who have lived within the framework of our society, who have saved, saved for a home, saved for their retirement. . . ."

Sen. Proc., 1975, p. 1685-1686.

2. House Hearing, May 9, 1975, a proposed amendment eliminating the proposed tax on dividends in its entirety.

Rep. Morano:

". . . It hurts, it hurts especially the elderly and the retired who carefully saved and invested their money and are now going to be taxed because of their thriftiness. It is a form of income tax, no matter what you call it, because dividend monies received are income. It is really a way to bring an income tax in the back door to Connecticut. Governor Grasso, when she was campaigning this Fall said she was against an income tax. Maybe she's for part of an income tax. . . ."

House Proc., 1975, p. 3141.

Both proposals were rejected by the Connecticut General Assembly.